

Proc 1

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

10,236

FILE: B-194064

DATE: May 22, 1979

MATTER OF: National Organization Service, Inc.

DLG 01620

## DIGEST:

1. Where firm did not protest prior to bid opening allegedly ambiguous language of invitation concerning use of prompt payment discounts in award evaluation, protest of this patent impropriety is untimely filed and is not for consideration.
2. Consideration of offered prompt payment discount in evaluation does not require determination that discount will--or most probably will--be earned.

National Organization Service, Inc. (National), protests the proposed award to a bidder other than itself under Wright-Patterson Air Force Base invitation for bids No. F33600-78-B-0365.

National is protesting the inclusion of the prompt payment discount in the evaluation of the proposed awardee, noting that consideration should not be permitted without first some indication of the probability that the discount will be taken in making payments under the resulting contract. National further notes that the agency's taking an inordinate amount of time for award could be construed as demonstrating that the proposed awardee's discounts might not be taken. Further, the invitation requirements are not clear that such a discount is to be evaluated. In support of this contention National notes that a subsequent Wright-Patterson invitation had to be amended to clarify this matter. Also, National states that its protest cannot be considered untimely since it inquired of the agency prior to and after bid opening about the evaluation of bids.

[Protest Involving Inclusion  
of Prompt Payment Discount]

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For the following reasons, we agree with the agency that the protest is in part untimely.

Section "D" ("EVALUATION AND AWARD FACTOR") of the invitation provided, in pertinent part, that:

"D-1 BASIS FOR EVALUATION OF OFFERS

"(a) All offers received will be evaluated and an award will be made to the offeror proposing to the Government the largest discount from the Publisher's Current List Price for books ordered under this contract.  
\* \* \*

"(b) All offerors are hereby notified that [insertion of such a discount] \* \* \* does not, however, preclude the offer of a cash discount [prompt payment discount], in Block 16 of the cover sheet, as provided therein. However, see Paragraph D-7. [The protester construes this to mean Paragraph D-3.]

\* \* \* \* \*

"(d) Total Estimated price for the contract shall be arrived at by adding the subtotals of the following:

"(1) Estimated dollar requirement of nondiscountable publications.

"(2) Estimated dollar requirement of discountable publications less the percentage discount offered by offeror.

\* \* \* \* \*

"D-3 BIDDERS NOTE

\* \* \* \* \*

"It is understood and agreed that, for the purpose of payments under this contract,

an offer of prompt payment discount in excess of two percent shall be considered as a trade or special discount. \* \* \*

\* \* \* \* \*

"NOTE: \* \* \* In such case [where both a trade and a prompt payment discount are offered], the trade discount will be deducted from the contract price upon award and the prompt payment discount will be taken, if earned. \* \* \*"

These provisions neither explicitly mention the prompt payment discount as being a part of the evaluation nor preclude consideration of such discounts. The "NOTE," immediately above, which contains the words "if earned" does not address the issue of evaluation but rather solely advises bidders as to how the discounts will be utilized after a contract has been awarded.

However, in the "SOLICITATION INSTRUCTIONS AND CONDITIONS" at paragraph 9 it was provided that:

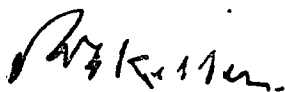
"9. DISCOUNTS. (a) Notwithstanding the fact that a blank is provided for a ten (10) day discount, prompt payment discounts offered for payment within less than twenty (20) calendar days will not be considered in evaluating offers for award, unless otherwise specified in the solicitation. \* \* \* [Typed in by the activity.] See General Provision entitled Discounts." (That provision sets forth procedural matters for the taking of discounts.)

This is the only provision in the invitation which addresses prompt payment discounts vis-a-vis bid evaluation. Nothing in this provision limits consideration of a prompt payment discount to one that will--or most probably will--be utilized at the time it may be taken.

It is our view, therefore, that paragraph 9 does indicate that certain prompt payment discounts, including the type offered by the proposed awardee, will be considered in the award evaluation. Assuming, arguendo, the invitation was ambiguous, we believe two interpretations of the discount provisions could be said to have confronted potential bidders. First (and the one that we believe is reasonable in this instance, see James R. Parks Company, B-193668, January 26 and March 6, 1979, 79-1 CPD 57 and 79-1 CPD 151), consideration of prompt payment discounts in the award evaluation is permitted to the extent the discounts come within the invitation limitation on days and without regard to whether the discount may or may not be earned under the contract awarded. Second, giving bidders the benefit of the doubt, the language of these provisions is clearly ambiguous to the point that it may be read to permit or not to permit consideration of prompt payment discounts in the award evaluation.

To the extent National is contending the invitation provisions are not clear concerning evaluation of the prompt payment discount, National was required to protest this patent impropriety prior to bid opening. See our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1978). Since it did not do so, the instant protest was untimely filed and is therefore not for our consideration. The fact that National, prior to bidding, allegedly asked the contracting activity for advice regarding the interpretation of the evaluation criteria and was advised merely to read the invitation and that the firm similarly inquired after opening does not affect our conclusion.

Finally, we see nothing in the applicable provisions of the invitation requiring a determination of the probability that an offered discount will be earned before it can be considered in the evaluation. See Defense Acquisition Regulation § 2-407.3 (1976 ed.), which provides for assuming that a discount will be taken in the evaluation of bids where, as here, the invitation so provides. Therefore, this aspect of the protest is denied.



Deputy Comptroller General  
of the United States